

December 21. 1731

(19)

INFORMATION

F O R

The Principal and Masters of the University of Glasgow;

A G A I N S T

James Robertson of Bedley.

MR. Robertson of Bedley having, amongst others, the Heritors of the Parishes of *Gair and Monkland*, brought his Action before the Lords Commissioners for Plantation of Kirks and Valuation of Teinds, for Valuation and Sale of the Teinds of *Bedley and Mollends*, against the University of *Glasgow* as Titular, the Defence insisted on for the University was, That because of the Exceptions in the Acts of Parliament 1661 and 1693, both granting Commissions for Valuation of Teinds, no such Action could proceed against them, it being by the first of these Statutes provided, **That Colleges, &c. shall not be constrained to sell, let nor dispone their Teinds;** and by the second, That the Commission then granted, **shall not be extended to the buying or selling of Teinds which formerly belonged to Bishops, &c. nor to Teinds belonging to Colleges and Hospitals, or mortified or destinate for pious Uses, without praejudice to value the saids Teinds, &c.**

To this it was answered for *Bedley*, That though in the common Case Colleges could not be compelled to sell their Tithes, yet the University in the present Case behoved to comply, because of an Obligation they lay under from a Bond or Disposition made by their Predecessors, *March 1662*, to his Ancestor Mr. *James Robertson of Bedley*, then one of the Senators of the College of Justice; wherein, after rating the Teinds at 12 Bolls, the then Masters of the University, by a Deed of a pretty extraordinary Nature, bound themselves and their Successors to sell those Teinds for the Sum of 1000 Merks, likeas, *per verba de presenti*, they did sell, though that Sale was to take no Effect till the 1000 Merks aforesaid should be paid: And the Term of Payment was left to the Discretion of the Purchaser, who in the mean time had Right given him to possess his own Teinds for three nineteen Years, at a Rental of 12 Bolls, by a Tack for that Space, ingrossed in the Bosom of this very extraordinary Settlement: Which contains besides, a pretty singular Provision, That Prescription shall not militate against the Effect of the Sale then intended, though the Purchaser should not pay up the Price proposed, till after the Lapse of the said three nineteen Years; as may more particularly appear from a Copy of the Deed hereunto annexed, which contains several other extraordinary Clauses.

To this the University replied, *imo*, That supposing the Warrantice of this Disposition or Obligation binding upon the present Managers, yet still *Bedley* could not have any Fruit from it in an Action before the Lords, as Commissioners of Teinds, but must resort to them in another Capacity, as Lords of Council and Session, to have their Decreet for compelling the University to fulfill the Deed in question. And *2do*, That supposing the Commission a proper Judicature, for discussing the Question concerning the Efficacy of the Deed 1662, it was not obligatory upon the University and its present Managers, the Granters thereof having intended a manifest Dilapidation, by gifting without an adequate onerous Cause; by which sort of Act they could not possibly bind their Successors: And they having attempted to make a Transaction concerning Tithes, the full and legal Title whereof was not then in their Person, nor effectually established in the University, till several

several Years after, could not oblige their Successors, by the Warrantice of any such Disposition made by them, to sell away and dispoſe Tithes which were veſted legally in the Univerſity by ſupervenient Titles, appropriating them for particular Uſes, ſubſequent to the Date of the Act of Dilapidation complained of.

The Allegations of Parties on theſe ſeveral Grounds having been heard the Day of July laſt, the Court was pleaſed to direct Informations by either Party to be exhibited.

The Argument on the firſt of theſe Points comes within a very narrow Compaſs: The Commiſſion, as ſuch, has undeniably no other or further Powers, than are given to it by the ſeveral Statutes creating it; and whatever might be ſaid before the Year 1693, when Colleges had no other Defence againſt the Sale of their Tithes, but the Proviſion in the Statute 1661, *That they ſhould not be conſtrained to ſell*; to which it might be a Reply, That by their own Act they had diſpenſed with that Immunity; of the Goodneſs of which Reply the Commiſſion might take upon them to be Judges; yet, with humble Submiſſion, the Act 1693 varies the Caſe. By that Act it is declared, That the ſaid Commiſſion *ſhall not be extended to the buying or ſelling of Teinds* which formerly pertained to Biſhops, &c. *nor to Teinds belonging to Colleges*. So that there is not Authority in the Court, on any Pretence whatever, to direct the Sale of Tithes belonging to the Univerſity. Under the Statute 1661 firſt mentioned their Power was univerſal, and they were reſtrained by a *Direction only*, not to exerciſe it, *ſo as to conſtrain Colleges to ſell*; but by the laſt mentioned Statute it is expreſſy provided, That the Powers of the Commiſſion *ſhall not extend* to the Sale of Tithes belonging to Colleges: So that it is humbly thought the Lords of the Commiſſion can as little authoriſe the Sale of the Teinds in queſtion, on Pretence of the Obligation founded on, as they can authoriſe the Sale of the Lands out of which the Teinds ariſe, were an Action brought before them upon a Minute of Sale, to compell the Proprietor to diſpoſe his Property, upon receiving the agreed Price.

Nor does it from this follow, that the Diſpoſition and Warrantice thereof, if it is in itſelf legal and binding, is to be deprived of its Effect; the Court of Seſſion is open, and the Defenders are amenable to it: There the Purſuer may try his Claim, which will doubtleſs meet with a proper Judgment; but ſurely he can have no Fruit from it before the Commiſſion, who can only value and direct the Sale of Tithes, upon the Foot of the ſeveral Acts of Parliament in that Behalf made, and who are diſabled to authoriſe the Sale of any Tithes belonging to Colleges.

This Reasoning might ſuperſede the Neceſſity of enquiring into the ſecond Point, *viz.* the Efficacy of the Diſpoſition or Obligation in queſtion to bind the Univerſity or its preſent Managers: But ſince the Court has deſired to ſee the Argument on that Subject alſo ſtated, the Defenders ſhall obey, and ſhow clearly, as they apprehend, two Things.

Fiſt, That the Tithes in queſtion were not legally and effectually eſtabliſhed in the Univerſity at the Time of the pretended Sale, a Conſequence whereof they take it to be, that no Bargain entred into by the then Adminiſtrators could bind their Successors *for the Price then agreed* to ſell thoſe Tithes, after they had acquired other and better Titles to the Subject. And

2dly, That the Bargain propoſed and executed in Year 1662, was a manifeſt Dilapidation of the College Revenue, a Mal-adminiſtration in the Governors thereof, and conſequentially not obligatory on their Successors, who cannot be bound to fulfill any Donation made by their Predeceſſors to the Prejudice of the Univerſity.

To place theſe Points in a clear Light, the Lords will recollect, that by the Act 1617, for Reſtitution of Chapters, all Tithes, &c. of benificed Perſons, which by the Act 1587 had been annexed to the Crown, were reſtored to the Members of the ſeveral Chapters; and by the Act 1621, ratifying the former Act, all Grants of ſuch Benifices made or to be made in prejudice of the Members of any Cathedral, without his Maſteſty's Warrant conſented to by Parliament, are declared to be null: That Biſhops and Chapters were ſuppreſſed *Anno* 1637, and their Benifices annexed to the Crown: That they continued in that State till after the Reſtoration, when his Maſteſty King Charles II. firſt by an Order in Council reſtored them *Anno* 1661, and afterwards, *Anno* 1662, by Act of Parliament redintegrated the

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Estate of Bishops, abrogating all Acts of Parliament, &c. that suppressed them, and ratifying and confirming all Acts made in Behalf of that Order. (19)

The Lords will be informed, That the Teinds in question belonged to the Subdeanry of *Glasgow*, and at the different Periods when Episcopacy stood suppressed, came by various Titles into the Hands of several Lay Titulars; the Earl of *Haddington* Anno 1602 obtained a Grant of the Patronage, &c. of Subdeanry, which he conveyed to Sir *James Cleland*, who afterwards sold the same to the Marquis of *Hamilton*; and the Marquis, upon the Suppression of Prelacy, obtained from the Crown in 1639 a Charter of the Premises, and in 1647 obtained from King *Charles I.* a Ratification of all Tacks and Titles to the Tithes he then had, and a new Tack for five nineteen Years.

As the Family of *Hamilton* had thus got one Set of Rights to the Patronage and Tithes in question, the Earl of *Kilmarnock* was possessed of another: Upon the Resignation of Mr. *Patrick Walkinshaw*, (who pretended to be Subdean,) in the Year 1624, the Lord *Boyd* found Means to obtain a Charter from the Crown, annexing the said Patronage to his Barony of *Melrofs*.

And in the 1657, whilst Prelacy remained still suppressed, the University of *Glasgow* obtained a Charter from *Oliver Cromwel*, ratifying and confirming their former Rights, and granting to them the Benefice and Revenues of the Subdeanry of *Glasgow*; and in the Year following, 1658, there is a further Grant by *Richard Cromwel*, of certain Emoluments out of the Subdeanry, which had been reserved by his Father's Charter.

Thus stood the Rights of the several Pretenders to the Subdeanry in the 1659; when the University transacted with the Duke of *Hamilton*, and purchased in his Titles to that Benefice: But still his Titles, as well as theirs, stood upon the Foot of Grants whilst Prelacy was suppressed.

It has been observed, that the Episcopal Order was revived by the King's Act in Council Anno 1661, though not established by Act of Parliament sooner than May 1662. In the interim, whilst Prelacy was not yet legally restored, but when there was a certain Expectation of it, in March 1662 *Bedley* thought fit to bring the Masters of the University into the Transaction above recited, whereby he stipulated a Right to purchase so much of their Patrimony at an Under-value, if he should think it worth the paying for; but in the mean time obtained a very long Lease of his Tithes at the then present Use of Payment, which he hoped might defend his Possession, whatever might be the Event of the projected Sale.

Though the University seem'd to have all the Titles that were wanted to complete their Right, as the Law then stood; yet when by Statute the Episcopal Order was restored, two Months after the Date of this Transaction, they found themselves at a Loss. The Titles they then had, could not possibly defend them against the supervenient Statute; and the Chapter of *Glasgow* must be without a Subdean, if they held his Benefice: Wherefore, and for preventing an apparent patrimonial Loss to that learned Body, as well as a Blemish in the Chapter, it was agreed by all Parties concerned, that the Rights to the Subdeanry, which hitherto were lame and imperfect in the University, should be legally completed in their favours; and that they being possessed of the Right of the Patronage and Benefice, should appoint their Professor of Divinity to be Subdean. In pursuance of which Design, the University, Anno 1664, having by that time purchased the Earl of *Kilmarnock's* Right, presented Mr. *John Ross* to the Subdeanry; who having received Collation and Institution, resigned Anno 1665, with Consent of the Archbishop, Dean and Chapter of *Glasgow*, the Benefice of the Subdeanry in his Majesty's Hands, in favours of the University; and the Archbishop, with Consent of the Dean and Chapter, resigned the Patronage of the Subdeanry, and consented to all Donations and Mortifications that should be made thereof in their favours by the Crown. In consequence whereof, by a Charter of Mortification under the Great Seal Anno 1670, the Premises are regranted to the University, and the Dignity of Subdean is conferred on the Professor of Divinity thereof; who is directed, as such, to have a perpetual Seat in the Chapter of *Glasgow*; and for the better sustaining his Dignity, had an additional Salary allowed him. Upon this Charter Infestment was taken, and both were ratified in Parliament Anno 1672.

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From the Case thus stated, it seems very certain : *1mo*, That the College's Titles were not perfect, and such as could defend against the Claim of the Bishop and Chapter, upon the Re-establishment of Episcopacy, when *Bedley* drew them into the Transaction above mentioned. And if they were drawn into an Agreement upon a Supposition of Rights which were good for nothing, when those Rights were dissolved by the subsequent Law, their Engagement was also dissolved ; no Payment having been at all made, and no true onerous Cause for entering into the Engagement.

2do, As their Rights were defeated by the supervenient Law, so the new Grant made in their favours, with the Consent of the Bishop, Dean and Chapter, limited and qualified the Interest vested in them in such Manner, that they and their Successors became utterly disabled to fulfill the Agreement with *Bedley*, had they been ever so willing. The Mortification of the Crown with Consent, as above, fixed the Subdeanry in the Person of the Professor of Divinity, and so appropriated the Benefice, that it was not left in the Power of the University to dilapidate or sell away any Part of the Tithes. The Tithes therefore, after the Mortification and Appropriation, being unalienable ; the pretended Contract for Sale can have no direct Effect : And as no Part of the projected Price was paid, the Warrandice would not have been incurred even by the Master's originally contracting, the Rights under which they contracted having been destroyed by the irresistible Act of the Legislature.

And *3tio*, The Circumstances above taken notice of discover the Reason of what, without knowing them, could hardly be reconciled to common Sense, *viz.* *Bedley's* omitting to pay down the elusory Price, and trusting to a Tack, and to the Warrandice of a Disposition, upon his paying that Price at a future Day, when he should think it proper. Some Progress had then been made towards the Restitution of Episcopacy, and the Completion of that Work was daily expected ; had *Bedley* paid down the 1000 Merks, he foresaw an Event approaching, in which that Sum must have been lost : Wherefore, though he took the Disposition *in verbis de presenti*, yet he superseded the Payment of the Price during his Pleasure ; securing thereby himself absolutely from Risk, if the University's Right should be defeated, and hoping belike to gain Advantage, if Regard to that learned Body should obtain, any how, a Confirmation of their Titles. But as he was not to have paid an adequate Price for the Subject, and indeed was not effectually bound to pay any Price at all, this Contrivance could be of no Benefit to him.

If it shall be said, that the 1000 Merks agreed to be paid, though not above half the real Value of the Tithes, was nevertheless a sufficient Price for a Communication of the lame Right that was in the University : Such Consideration might indeed possibly support the Bargain, if that Price had been paid down, so that the Buyer stood any Risk ; but if he agreed to pay but half Price, and yet evaded all Risk, by agreeing to pay for the Tithes this elusory Sum only when he should think proper, which to be sure would be no sooner than the University's Rights should be established, and thereby become worth double the Sum that he was to pay, no Equity would allow him to profit of such a Transaction, had it been entered into by any private Gentleman, who could bind his Successors ; far less when made by the Managers of a Society, who cannot bind their Successors further than they act for just and adequate Considerations.

Having said so much on this Subject, it is not necessary to employ many Words on the other Head ; which is, to shew, from the Frame and Texture of the Agreement in question, that it cannot be binding upon the present Managers of the University, though the Titles under which it was made had been 'good, and tho' there had been no Accession of Right to the College.

For, supposing the University's Title to the Tithes good at the Date of this Transaction, the agreed Price is manifestly not half the Value ; and the Conclusion is necessary, That either the Managers for the Time were imposed upon, in which Case their Deed is reducible ; or that, with their Eyes open, they took upon them to make a Donation, which surely was not within their Power.

Had they made an effectual Sale *de presenti*, received the Money, and put *Bedley* in possession, it might be difficult *post tantum tempus* to unravel this Transaction : But as to this Hour *res est integra*, and *Bedley's* Successor comes now only



only to demand Performance upon offering to pay the Price, the Validity of the Obligation upon the present Masters must needs be enquired into. And if it is true, that the Managers of a Society cannot, without onerous Cause, gift away, or bind their Successors; it must, 'tis humbly thought, be held, that the Deed in question cannot now produce any Action against the University.

And this appears from the Deed itself to have been the Sense of *Bedley*, who contrived, as well as of the Masters, who executed it; it was in their Opinion necessary to suggest some onerous Causes, the 1000 Merks being no adequate Price for the Tithes: And therefore they take upon them to recite the great Obligations the College had to *Bedley* for his Service as a Lawyer for twenty eight Years together, preceeding the Year 1650, and *his always refusing 100 Merks of yearly Salary for the same*; and to pin down the Basket, and prevent their Successors from quarrelling the Right granted for so substantial a Consideration, *they bind themselves and their Successors in Office* to pay the said Salary of 100 Merks *per Annum* for twenty eight Years, in case the Disposition then made be quarrelled.

But then, with Submission, the Recital intended to support the Deed, destroys it; for not to take Notice, that the twenty eight Years Service had determined twelve Years before the Bargain in question, and that some further Evidence than the bare recital would be expected, that such Services had been performed and not paid for. The Recital itself avers, That *Bedley had always refused* to take the said yearly Sum of 100 Merks; now, if *Bedley* had, for twenty eight Years together, preceeding the Year 1650, *generously refused* to accept that Fee from the College, the Debt by such *Refusal* was effectually *discharged*. And however a private Client might have returned his Lawyer's Generosity, by such a Liberality as this in question, on any subsequent proper Occasion, yet it seems certain the Managers of the University had no Power to exert Generosity at the Expence of the Collegiate Body. And as they could not make *Bedley* a Present of their Tithes, because he had done the College good Service on former Occasions, so neither could they *revive* a Debt that he had *discharged*, in order to constrain their Successors to perform a Bargain, which they, without any legal Authority, had entered into.

In respect whereof, &c.

DUN. FORBES.

COPY of the Disposition of Tithes by the College of Glasgow to the Lord *Bedley*.

BE IT KEND to all Men by thir present Letters, US Mr. *Robert Baillie* Principal of the College of *Glasgow*, Mr. *John Young* Professor of Theology thereintil, Mrs. *Patrick Young*, *Andrew Burnet*, *George Sinclair* and *Robert Areskine*, Regents in the said College, having Right to the Teinds great and small, Parsonage and Vicarage of the Sub-deanry of *Glasgow*; and we, with the special Advice and Consent of Mr. *Ralph Rogers*, one of the ordinary Ministers of the Burgh of *Glasgow*, Rector of the said College, and of me the said Mr. *John Young*, Dean of Faculties thereof: FORSUAMEIKLEAS Mr. *Patrick Gillespie*, late Principal of our University, having procured a Right and Disposition from the Duke and Dutches of *Hamilton*, to the whole Teinds of the Subdeanry comprehended in the Parish of *Calder* and *Munkland*, in favour of our University, whereof the Lands of *Bedlay* and *Mollends* are a Part, and pays yearly twelve Bolls of old Rental Bolls; and by expreis Bargain it was condescended by the said Mr. *Patrick*, and the rest of the Masters of the said College, never to quarrel the foresaid old Rental, but to sell and dispone the foresaid Teinds, as well Parsonage as Vicarage, payable as said is out of the foresaid Lands, in favours of Mr. *James Robertson* then of *Bedlay*, now one of the Senators of the College of Justice, for Payment making to us and our Successors in Office, of an Thousand Merks Scots Money, and that so soon as the said Mr. *James* his Tack of the Teinds

Teinds should expire. And now the said College is further obliged to the said Mr. *James* for his eminent Services than the Quota above-express'd, as serving as Advocate in all Affairs wherein the said College was concerned, sice the Twenty two Year of God to the Fifty Year of God, for the Space of twenty eight Years, and always refusing One hundred Merks of Sallary yearly for the same; THEREFORE WIT YE US, ALL with one Consent and Assent, to have sold, annal-zied and dispoñed, likeas we by the Tenor hereof, sell, annalzie and dispoñe the whole Teind-Sheaves, great and small, Parsonage and Vicarage, payable any manner of way out of the Lands of *Bedley* and *Mollends*, heritably and irredeemably to the said Mr. *James I. Robertson*, his Heirs and Assignies; and these Teinds to be incorporate with the Stock *ad perpetuam remanentiam cum decimis inclusis*; together with all Right, Title, Interest, Claim of Right, Property and Possession, which we have, or can pretend to the said Teinds any Manner of Way: With Power to the said *James* to intromit with, and uplift the foresaid Teinds, Parsonage and Vicarage in all Time coming, and to do every other thing needful, as we might have done before this present Disposition was granted by us. And we with Consent foresaid, do oblige us and our Successors in Office, to warrant this present Disposition of the foresaids Teinds, Parsonage and Vicarage to the said Mr. *James* and his foresaids, at all Hands, and against all deadly. And in respect the said Mr. *James Robertson* has taken an Tack of the foresaid Teinds above dispoñed, for the Space of three nineteen Years next to come, of the Date of thir Presents, and has superseded the Payment of the foresaid thousand Merks, during his Pleasure, which is to our Advantage; yet, nevertheless it shall be leifom, and at the Option of the said Mr. *James* and his foresaids, either to pay the Tack-duty therein-contained, or the foresaid thousand Merks, during the foresaid Tack of three nineteen Years, as best shall please the said Mr. *James* and his foresaids, as the Value of the foresaid Teinds condescended upon; and the taking of the foresaid Tack shall not invalidate the foresaid Disposition in any Sort, for upon Payment of the foresaid thousand Merks, or offered in case of Refusal, the foresaid Teinds, as well Parsonage as Vicarage, shall be redeemed at any Time within the Space of the said three nineteen Years, or at any Time thereafter, notwithstanding the Act of Prescription, by the said Mr. *James* and his foresaids; and he and his foresaids shall have Right by the Disposition above mentioned, and the Tacks and Tack-duty shall be null in all Time thereafter. And we oblige us, with Consent foresaid, never to quarrel the foresaid Disposition; and if it shall happen that either we, or Successors in Office shall quarrel or impugn the same, we oblige us, and Successors in Office, to pay the foresaid Sallary of one hundred Merks, for the space of twenty eight Years, which we are Debtors to the said Mr. *James* and his foresaids, with Annualrent from the Date hereof, ay and while the same be quarreled, and this by and attour Performance. And for the more Security, we are content, and consent thir Presents be registrate in the Books of Council and Session, or Commissary Court-books of *Glasgow* and *Hamilton*, to have the Strength of a Decreet, that Letters of Horning on Fifteen Days, and others needful, may pass hereupon, in Form as effeirs; and thereto constitutes

Procurators, &c conjunctly and severally. In witness whereof thir Presents written by Mr. *Alexander Robertson* Servitor to the said Mr. *James Robertson*, at the Desire of Mr. *John Herberfson* Writer in *Glasgow*, we have subscribed at *Glasgow* the Seventeenth of *March* 1662, before these Witnesses, *Gabriel Russel* Student in the said College. *James Corbet* Porter thereof, and the said Mr. *James Herbertfson*, and *James Thomson* Servitor to the said Mr. *James*. Sic subscribitur, *R. Baily*, *Patrick Young*, *An. Burnet*, *Ralph Roger*, *James Young* D. F. *Robert Erskine*, *George Sinclair*, *James Corbet* Witnels, *James Thomson* Witnelss, *Gabriel Russel* Witnelss, Mr. *Herbertfson* Witnelss.

Registrare in the Books of Session the 31st of *July* 1705.

